

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

PLAYGIRL, INC.,

Defendant-Appellee.

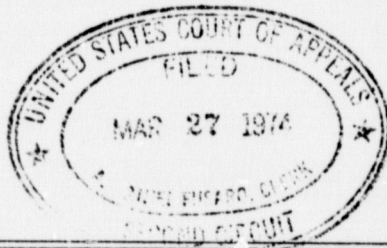
INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF PLAINTIFF-APPELLANT
AMERICAN BRANDS, INC.**

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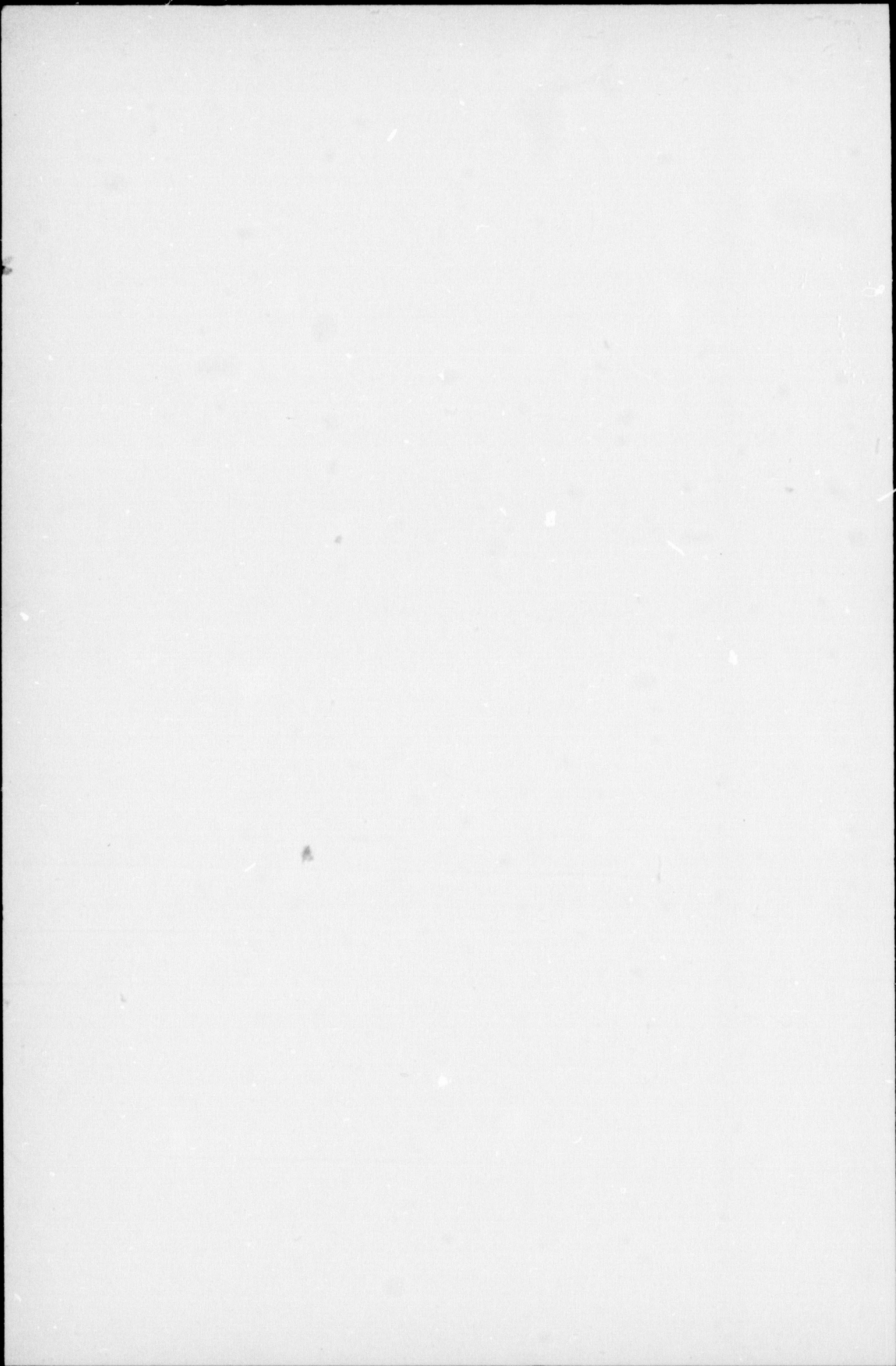


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INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF OF PLAINTIFF-APPELLANT AMERICAN BRANDS, INC.

Preliminary Statement

Plaintiff-Appellant, American Brands, Inc. (herein American), respectfully appeals to this Court pursuant to 28 U.S.C. 1292(a)(1) from the Interlocutory Order of the United States District Court Judge, Honorable Charles L. Brieant, Jr., for the Southern District of New York entered on the 8th day of March, 1974, denying American's motion for a preliminary injunction seeking to enjoin the defendant-appellee, Playgirl, Inc. (herein Playgirl) from refusing to publish American's advertising on its back cover and from accepting other advertising for its back cover. The findings and order of the District Court are included in the transcript of oral argument (A 114-A 132).

Questions Presented

1. Does the refusal of Playgirl to publish American's advertising on its back cover pursuant to contract deny American a unique contractual right and thereby create irreparable injury to the rights of American?

2. Does the continuing refusal of Playgirl to publish American's advertising on its back cover pursuant to contract cause immeasurable damage to American and thereby result in irreparable injury to the rights of American?

3. May the District Court, after finding that there is a cause of action, on the record that does not disclose significant dispute as to material fact, refuse to grant a preliminary injunction when there is irreparable injury?

Statement of the Case

On January 26, 1973, Playgirl entered into a contract for placement of American's advertising on the back cover of Playgirl Magazine. American is a New Jersey corporation that manufactures and sells a wide range of consumer products and advertises its products as an important aspect of its marketing program. Playgirl is a California corporation that is a new entry to the magazine market, having published its first issue in 1973 (A 14, 15, 71).

Early in 1973, at a time when Playgirl Magazine was merely a speculative commercial prospect, before any issue had been published, Playgirl approached American seeking backing, in the form of advertising, for its new venture. American agreed to be one of the ground floor advertisers, buying a twelve month renewable contract, and thereby providing Playgirl with a reliable source of income at a time when such income was crucial to the success of

Playgirl. In return, American required in the contract (herein the Agreement) the important, and expressly stated, proviso that:

"Your acceptance below of this agreement shall also serve to acknowledge our undersanding [sic] that we have the continuing and irrevocable right, at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published." (Complaint Exhibit A, A 21-22)

Under the terms of the Agreement, American agreed to purchase the back cover page of each of the first twelve issues of Playgirl Magazine and to pay for the same at rates established by Playgirl from time to time in accordance with the custom and usage of the advertising industry. In accordance with the Agreement, Playgirl has published American's advertisements on the back cover of each of its eleven issues to date and has agreed to accept American's advertising for the last issue of the first publication year. American has paid Playgirl, promptly when billed, for the advertisements published, a sum in excess of \$50,000 (Chester Affidavit ¶ 7-15, A 15-16).

Notwithstanding the clear written Agreement, and subsequent ratification thereof, Playgirl has unequivocally stated its intention to dishonor this contract by refusing to accept American's advertising for the back cover of its subsequent issues commencing with the June 1974 issue (Chester Affidavit ¶ 16-21, A 16-17).

Playgirl is a unique advertising medium, reaching a readership which is otherwise not distinctly served. Playgirl has stated that its readers are primarily higher income young women, average age 24, the age when purchasing habits are formed. More particularly, Playgirl has stated

that its magazine is "Unconventional. Unprecedented. Unparalleled." and Playgirl's Executive Vice President, William J. Miles, Jr. has added that "only Playgirl delivers this young, affluent and malleable female audience for your advertising message" (Chester Affidavit ¶ 29-30, A 19).

But further, as the Court can well recognize, every magazine is unique and each advertising space in a magazine is unique. There can be no dispute that the opportunity to advertise with Playgirl is a valuable and unique contractual right; and more particularly, the back cover of Playgirl is especially valuable and unique among other advertising media, for it's often carried visibly displayed as a "walking billboard" (A 117), for as this Court may recognize, Playgirl is not a magazine which everyone may find acceptable.

Consequently, after American notified Playgirl that American would exercise its option to renew the back cover space and Playgirl firmly advised American that Playgirl would breach its contract, American sought its only remedy in the courts. Accordingly, on February 13, 1974, this action was commenced in the New York County Supreme Court by service of a Summons and Complaint along with an Order to Show Cause, returnable in that Court on February 19, 1974 (A 12-13, 70-78). The expedient remedy of an Order to Show Cause, seeking a preliminary injunction, was required because Playgirl's publication date for the June 1974 issue was March 18, 1974, only a month after the action commenced (Chester Affidavit ¶ 25, A 18).

On February 19, 1974 oral argument was held before the Honorable Hyman Korn, Justice of the New York Supreme Court. After argument and an unsuccessful attempt to settle the issues, counsel for Playgirl was allowed until March 1, 1974 to file a further memorandum of law (A 116). In lieu thereof on February 27, 1974,

American was served with a petition of removal to the District Court (A 65-67).

Accordingly, in order to make sure its motion which was pending at the time of removal be ruled on by the District Court, American obtained an Order to Show Cause from the Honorable Charles L. Brieant, Jr., United States District Judge, returnable before that Court on March 6, 1974 (A 3-5). Oral argument was had on that date and American's motion for a preliminary injunction was denied.

Playgirl served its Answer to the Complaint at the time of oral argument before the District Court. A review of the Answer and the Complaint reveals that the undisputed facts of this case are that Playgirl commenced publication with an issue dated June 1973 and that prior to publication advertising was solicited for the magazine from American (Complaint and Answer ¶¶ 4, 5, A 72, 79); that the Agreement sets out that American is to have an irrevocable option "to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published" (Exhibit A to Complaint, A 21-23 and Answer ¶ 6, A 79-80); that Playgirl has published American's advertisements and accepted payment therefor (Complaint and Answer ¶¶ 8, 9, A 72-73, 80); and that Playgirl will refuse to publish American's advertising on the back cover in each issue during the twelve month period commencing with the June 1974 issue (Complaint and Answer ¶ 10, A 73, 80).

Further, there is also no dispute in the record that one Carl Vann signed the Agreement at a time when he was "soliciting orders for advertising in Playgirl Magazine" (Ritter Aff. ¶ 3, A 59; Vann Aff. ¶ 3, A 62-63). The letters of Norman H. Chester dated December 13, 1973 and January 11, 1974 establish, without question, that American has exercised its option under the Agreement

(Chester Aff. Ex. D and Ex. F, A 26, 28) and (Miles Aff. Ex. J and Ex. L, A 26, 28). In addition, there is no dispute that the "back cover of a magazine is a desired location for advertising due to its exposure" (Miles Aff. ¶ 21, A 88) nor can there be any dispute that Playgirl is a unique magazine particularly in light of Mr. Miles' statement which is quoted in ¶ 29 of Mr. Chester's Affidavit (A 19) and which was prepared for circulation throughout the advertising industry. Indeed, the record does not disclose any significant dispute of a material fact.

With this factual record before it at the oral argument the District Court determined that the complaint "presents fair grounds for litigation. That is close to the question of probability of success" (A 131). It noted that the New York contract is "signed in writing by the party to be charged . . ." (A 123) was "an option in writing at the very least" (A 124); and that it did not "think much of [an] argument" that the contract was void (A 123-124). The District Court however, was not convinced that first, there was irreparable injury to American and second, that the remedy of mandatory injunctive relief or, in the alternative, negative injunctive relief would be appropriate. In short the District Court held "I would still believe that money damages would be adequate and that he [plaintiff] would have adequate remedy" (A 131).

American has taken this interlocutory appeal on this undisputed record, because as a matter of law, it is being irreparably damaged and because the District Court erred in denying its request for a preliminary injunction in the face of such a record.

I. The refusal of Playgirl Magazine to publish advertising on its back cover pursuant to a contract denies American a unique contractual right and thereby creates irreparable injury to American.

The District Court has correctly noted that "irreparable injury" is a necessary element to a preliminary injunction, but as Judge Friendly has said about that term:

"Recitation of this term generally produces more dust than light. A plaintiff asking an injunction because of the defendant's violation of a statute is not required to show that otherwise rigor mortis will set in forthwith; all that 'irreparable injury' means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired."

Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966).*

It is American's contention herein, that, as a matter of law, it "will suffer harm which cannot be repaired." The harm to American cannot be repaired for two distinct and independently sufficient reasons. First, Playgirl's back cover is a unique property with no available substitute; and second, Playgirl's breach of its advertising contract with American has resulted in immeasurable damages.

The initial fact that Playgirl's back cover is unique certainly requires no elaborate factual showing. Playgirl

* Judge Friendly added:

"... At least that is enough where, as here, the only consequence of an injunction is that the defendant must effect a compliance with the statute which he ought to have done before."

Certainly the same analysis would apply when a defendant must "effect a compliance with" its contract that it "ought to have done before."

has its own distinct readership. It is a magazine for women whose median age is 24, the "habit-forming" years. Playgirl's own personnel consider their entire publication unique (Chester Aff. ¶ 29, A 19); further, Playgirl Magazine's format and editorial content are intended to reach a market which heretofore was not distinctly served (Chester Aff. ¶ 30, A 19).

More importantly than the obvious factual point of the uniqueness or peculiarity of Playgirl, there is a fundamental legal reason why Playgirl Magazine's back cover, as any magazine's back cover, should be held to be a unique property, the loss of which cannot be repaired with money damages. It is well established that equity shall grant specific relief to suiters seeking to obtain property which is not readily evaluated in monetary terms. The axiom that equity will convey specific performance of a land contract is the most fundamental example of this wider principle. The reason for such a rule is clear and obvious, without the rule there would be no remedy for persons denied peculiar property rights, property rights we choose to call "unique". It is for these reasons that equity grants specific remedial relief when the loss suffered is "unique". For example in *Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 246 N.Y.S.2d 600 (1963) the New York Court of Appeals noted that an injunction may issue against breach of a personal service contract when these services are "unique" or "extraordinary", 13 N.Y.2d at 274. In *McCormick Dray Line, Inc. v. Lovell*, 13 D. & C. 2d 464 (1957) the Pennsylvania court found "clearly a case for relief by specific performance" because certain trucking licenses were held "unique", 13 D. & C. 2d at 467.

The Uniform Commercial Code has codified this rule that specific performance will be decreed when goods are "unique", § 2-716(1). This rule was recently applied in *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F.Supp. 923 (N.D. Cal. 1970). In *Kaiser* the plaintiff

had been denied specified goods to be provided pursuant to a contract and accordingly sought a preliminary injunction in the California State Court. The case was removed to the United States District Court and under federal procedure and pursuant to U.C.C. § 2-716(1) a preliminary injunction for specific relief was granted. The court noted that "specific performance will be decreed when goods contracted for cannot be purchased on the open market or otherwise covered." 321 F.Supp. at 932. Of course the Uniform Code does not govern this transaction, not being a transaction in goods, but the rule codified therein has always been the rule of common law. For example, *Cur-tice Brothers' Co. v. Catts*, 72 N.J. Eq. 831, 66 A. 935 (1907), held that a contract to deliver an entire production of tomatoes was specifically enforceable and *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) has noted that specific performance may be granted for a particular lot of carrots.

A recent application of this principle was upheld by this Court in an industry similar in many ways to magazine advertising. A series of cases arose out of the "explosive yet impermanent popularity" (457 F.2d at 51) of the rock opera *Jesus Christ Superstar*. In the case of *Robert Stigwood Group Limited v. Sperber*, 457 F.2d 50, 55 (2d Cir. 1972) this Court held that "once a prima facie case of infringement [of copyright] has been made out, a preliminary injunction should issue, even in the absence of a detailed showing of irreparable injury where dramatico-musical works are concerned," the stated reason being a presumption of irreparable injury when "copyrighted material is invaded."

The assumption of the District Court below that the back cover of Playgirl magazine was not unique is contrary to the facts in the record before it. The finding of the District Court that "[a]dvertising on magazines, as the Court well knows, in this country is available to advertisers and there are a number of magazines in business

in this area and elsewhere, and Playgirl is not the only one in its field or the only one in the area" (A 129) is an over-simplification of the issue presented to it and misses the point. First, it assumes that all advertising is fungible; common sense dictates it is not. One does not ordinarily advertise bridal gowns in a scientific journal or whiskey in a children's magazine. Secondly, it assumes that other magazines with similar circulation and readership as Playgirl, have back covers available to American at any price. Yet, as stated by Playgirl's own Executive Vice President and Director of Advertising "[t]he back cover of a magazine is a desired location for advertising due to its exposure" and "normal demand for the back cover is high" (A 88).

Surely, if there is "irreparable injury where dramatico-musical works are concerned" and "copyrighted material is invaded," there must be irreparable injury where a unique advertising property is concerned, the back cover of a particular magazine. The refusal of Playgirl to publish American's advertising on its back cover denies American a unique contractual right and has thereby created irreparable injury to American for which a preliminary injunction should have been issued.

II. The continuing refusal of Playgirl to publish American's advertising on its back cover causes damages which cannot be measured and are irreparable.

This is a simple case which raises a question of substantial and significant import to the advertising industry. The District Court in this case has held in effect that advertising space cannot be contractually reserved. That court's conclusion that money damages will repair the clear harm which Playgirl's breach is causing is not realistic in view of the nature of advertising. Indeed, Amer-

ican has not found any case where a court was able to formulate money damages for breach of an advertising space contract when the contract price is, in accordance with the current custom of the industry, fully controlled by the magazine's publisher.*

If this court were to consider the various possible formulae to show American's damage in dollar terms, it would be clear that a jury would be asked to guess or speculate beyond the permissible limits of jury deliberation. For instance if American were to allege a loss in sales of consumer products, it would be necessary to demonstrate to the court the extent that sales declined due to this one particular impetus. A legal treatise on advertising addressed this point and concluded that it simply is not possible:

"The only measure of damages from the advertiser's standpoint is the loss of business resulting from the failure to insert the advertisement. It is quite obvious that to a large extent it would almost be impossible to trace the loss of business directly to the failure to insert an advertisement. To demonstrate how many persons would have read the advertisement and then attempt to ascertain how many readers would have acted upon the advertisement is beyond human calculation and purely speculative." Finkelhor, *Legal Phases of Advertising* 296 (1938).

Another theory of damages, suggested by the court below (A 129) is replacement advertising, assuming that

* The advertising industry is not completely without litigation, for instance in *Metropolitan Broadcasting Corp. v. Lebowitz*, 293 F.2d 524 (D.C. Cir. 1961) the court granted money damages because the contract called for a fixed price for the advertising time which the defendant refused to broadcast when the fair market value of that advertising time was found to be higher than the contract price. This is in sharp contrast to the case at hand where the price of advertising is set by the publisher in accordance with circulation and the custom and usage of the trade.

the back cover of another magazine with similar circulation and readership can be obtained, the difference in price between Playgirl and the other magazine being the damages sustained by American. The District Court's assumption that similar advertising is available is simply not accurate. Playgirl is unique, has a unique circulation and readership which is served by no other (Chester Aff. ¶ 28, A 19). Further, most back cover advertising space is committed to renewal options under the custom and usage of the trade (Chester Aff. ¶¶ 32-34 A 19-20) and would not be available to American each month as is required by the Agreement.

Consequently, American cannot "cover" or mitigate and prove damages. Even if American could, somehow, "cover", Playgirl certainly would argue that any expense above their rate card price purchased greater exposure than Playgirl would have provided and is therefore not recoverable. It is simply not reasonable to suggest that a company with many magazine advertisements will be able to show to a court that one particular advertisement was a "suitable replacement" for some other magazine advertisement and therefore the higher price of the second advertisement is fully recoverable in damages.

American's dilemma here is not unlike the dilemma recognized by The Lord Chancellor of England in the often cited case (raised by District Judge Brieant), *Lumley v. Wagner*, 1 De G. M.&G. 604, 42 Eng. Rep. (22 Chancery) 687 (1852). In *Lumley* an opera singer refused to perform under her contract to sing at the Drury Lane Theatre and was threatening to sing at another theatre, and, by any reasonable theory, the theatre owner was without provable damages. The court recognized that a mandatory injunction to sing was not a practicable judicial act, but would not, nonetheless, "suffer" men "to depart from their contracts at their pleasure, leaving the party to the mere chance of any damages which a jury might give,"

1 De G. M.&G. at 619, 42 Eng. Rep. at 693. Accordingly an injunction issued ordering Mlle. Wagner not to sing at any theatre other than the Drury Lane. American's dilemma, and the dilemma this decision could create for an entire industry is no less substantial. Playgirl has disregarded its contract at its pleasure and a rule limiting American to try and prove damages will surely leave Playgirl, and all other magazines free to breach these standard industry agreements with impunity. It is interesting to speculate where would Playgirl have gone, if on January 26, 1973 American had said that it will not agree to purchase future advertising space because the courts will not enforce such agreements.

The rule of equity that immeasurable damages are irreparable is by no means novel. As the Supreme Court at Maine said in *Unity Telephone Co. v. Design Service Co.*, 158 Me. 125, 179 A.2d 804, 811 (1962):

"It is a well known maxim that equity will not suffer a wrong without a remedy, and absence of precedents does not prevent the application of equitable doctrines."

This is certainly a logical extension of Judge Friendly's exposition that irreparable harm is harm that cannot be repaired, *Studebaker Corp. v. Gittlin*, *supra*. This court has also stated that:

"The concept of irreparable injury in equity traces back to the early assumption of jurisdiction by the Courts of Chancery to enjoin waste, continuing trespass and nuisance. Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate." *Danielson v. Local 275 Laborers Int. Union*, 479 F.2d 1033, 1037 (2d Cir. 1973).

In another instance, the court in *Schuetzle v. Duba*, 201 F. Supp. 754, 757 (D.S.D. 1962) set out this principle as

follows:

“Irreparable injury or damage which may be prevented by injunction includes damage “irreparable” in the sense that it cannot be estimated by any accurate standard but only by conjecture’, *Columbia College of Music & School of Dramatic Art v. Tunberg*, Wash., 116 P. 280. Such damage ‘does not have reference to amount of damage caused, but rather to difficulty * * * of measuring amount of the damages inflicted’, *Crouch v. Central Labor Council of Portland and Vicinity*, Oregon, 293 P. 729. ‘An irreparable injury is one the extent of which is doubtful, making it impossible to ascertain the measure of just compensation’, *Lyon v. McLaughlin*, 32 Vt. 423, and in the same case, ‘where the extent of a prospective injury is uncertain, so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury.’ See also 43 C.J.S. Injunctions § 23, p. 447.”

Also in *Washington Capitols Basketball Club, Inc. v. Barry*, 304 F. Supp. 1193, 1197 (N.D. Cal. 1969), aff’d 419 F.2d 472 (9th Cir. 1969), the court noted that the services of a basketball star were not readily subject to monetary evaluation and said:

“Irreparable injury is that which cannot be compensated by the award of money damages; it is injury which is certain and great. *Federal Maritime Com’n. v. Atlantic & Gulf/Panama Can. Zone*, 241 F. Supp. 766, 781 (9th Cir. [sic] 1965). Such injury exists when an athletic team is denied the services of an irreplaceable athlete. Barry is just such an irreplaceable athlete. He was the leading collegiate basketball scorer in the United States during the 1964-65 season and was voted Rookie of the Year during his first season of professional basketball in 1965-66

while playing with the Warriors. He was the leading scorer in the NBA during the 1966-67 season and was voted Most Valuable Player in the 1967 National Association All Star Basketball Game. Finally, while playing for Oaks during the 1968-69 season, he was the team's and ABA's leading scorer until an injury forced him to cease play. It is apparent today that with such a surfeit of fine basketball players in the United States graduating annually from collegiate ranks, the mere signing of a player to a professional basketball contract is substantial evidence of his outstanding qualities. When, like Barry, a player has proven his superior ability under the rigorous conditions of professional basketball, it is clear that money alone cannot replace his loss."

Also, this court has affirmed a district holding in *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969), affirming 295 F. Supp. 711, 723 (S.D.N.Y. 1969), that when it would be impossible to estimate or compute damages, there is irreparable injury.

In the case at bar, American is clearly without any formula to measure its damages. As American's Media Director stated in his affidavit, ¶ 27, "There is no way to precisely demonstrate and there is no accurate method to show the amount of monetary damage which results when an advertisement is not published" (A 18). This was the only statement on damages in the record before the District Court. When such a concise and direct factual record is applied to the equally clear law that when damages cannot be proven there is irreparable damage and good cause for equitable relief, the error of the District Court complained of herein is manifest.

III. After finding that there is a cause of action and a probability of success on a record that does not disclose significant dispute of material fact, the Court must grant a preliminary injunction when there is irreparable injury.

A. There is a Valid Cause of Action:

There can be no doubt that the District Court's determination of a probable cause of action is correct. For instance, "[i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not." *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411 at 416, 125 N.E. 814 at 816 (1920); see also *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82 at 87, 111 N.E.2d 218 at 221 (1953). The court below did not "think much of" Playgirl's suggestion that the Agreement is "void" (A 123-124). "That contracts providing for perpetual performance are not invalid is undoubtedly the law of New York" *Ketcham v. Hall Syndicate, Inc.*, 37 Misc. 2d 693 at 700, 236 N.Y.S.2d 206 at 213 (N.Y. Sup. 1962), *aff'd* without opinion 19 App. Div. 2d 611, 242 N.Y.S.2d 182 (1963).

The case of *Ketcham v. Hall Syndicate, Inc.*, *supra*, is a good example of New York law on contracts such as the one involved here. Hank Ketcham, the creator of the popular cartoon panel "Dennis the Menace" signed an agreement to grant exclusive rights to his cartoons to Hall Syndicate for as long a time as Hall Syndicate met certain minimum payments. Ketcham brought the action for declaratory relief to test this contract. The court had no difficulty with the question of mutuality and clearly held that a renewal option by Hall was binding upon Ketcham.

There can be no question that the Agreement is a binding written contract signed by the party to be charged and supported by consideration and mutual obligations. American has submitted advertising copy to Playgirl and Play-

girl has published it on its back cover; American has paid more than \$50,000 for the advertising published; American is obligated to pay considerable additional sums for the additional advertisement to be published during the remainder of the first publication year; and American shall continue to be obligated to pay for all future advertising space that it purchases under its option at a rate which defendant may set in accordance with the established practices of magazine advertising. This contract certainly establishes a greater obligation on American than the court found necessary in the often cited case of *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), Cardozo J., where "The defendant gave an *exclusive* privilege," and consequently "was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff," 222 N.Y. at 91, 118 N.E. at 214 (emphasis in original), and all the plaintiff had given in return was his obligation to exercise best efforts. "The acceptance of the exclusive agency" by Mr. Wood "was an assumption of its duties," 222 N.Y. at 91, 118 N.E. at 214; just as American's exercise of its option will require the payment of advertising fees as established and published by Playgirl.

As noted, this case is not unlike *Ketcham v. Hall Syndicate Inc.*, *supra*, where the court compared the *Wood* case saying, "the defendant was expressly obligated to produce certain minimum payments to keep the contract in force, where in the *Wood* case, *supra*, the court merely implied an obligation on plaintiff's part to use its best efforts. There is thus certainly more basis for finding mutuality than existed in *Wood*, where the Court of Appeals found mutuality," 37 Misc. 2d at 698, 236 N.Y.S.2d at 212. Clearly then, the contract in question is a binding mutual obligation supported by consideration.*

* It should also be noted that in any event absence of consideration to support the option would not constitute a defense to American's right to enforce this irrevocable written option. McKinney's General Obligations Law § 5-1109.

"It has long been the rule that equity is available to place the parties to a contract in the legal position they would have occupied if the repudiated agreement had been performed," *Monclova v. Arnett*, 3 N.Y.2d 33 at 36, 163 N.Y.S.2d 652 at 654, 143 N.E.2d 375 at 376 (1957), and accordingly the remedy of a preliminary injunction is required to protect American's right to performance of its contract with Playgirl.

B. Probability of Success on The Merits is Clear on This Undisputed Record:

The District Court said at oral argument that "I think [the Complaint] presents fair grounds for litigation. That is close to the question of probability of success" (A 131).

As stated above, a review of the Answer and the Complaint reveals that the undisputed facts of this case are that Playgirl commenced publication with an issue dated June 1973 and that prior to publication advertising was solicited for the magazine from American (Complaint and Answer ¶¶ 4, 5, A 72, 79); that the Agreement sets out that American is to have an irrevocable option "to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published" (Exhibit A to Complaint, A 21-23, Answer ¶ 6, A 79-80); that Playgirl has published American's advertisements and accepted payment therefor (Complaint and Answer ¶¶ 8, 9, A 72-73, 80); and that Playgirl will refuse to publish American's advertising on the back cover in each issue during the twelve month period commencing with the June 1974 issue (Complaint and Answer ¶ 10, A 73, 80).

The only true issue raised by Playgirl as a defense to this suit is the question of the authority of Carl Vann to execute the Agreement on behalf of Playgirl although he admittedly signed it while "soliciting orders for advertising in Playgirl Magazine" (A 59, 62-63). The Answer, ¶ 35 alleges that "Carl Vann was not authorized by defendant

to act to bind the defendant by contract or otherwise . . .," (A 82) despite the fact that Playgirl permitted him to represent himself as "Advertising Director" when signing Playgirl's letterhead (A 24). This issue can be readily disposed of when one recognizes, and the Answer admits, that Playgirl published American's advertising and accepted American's payments (Answer ¶¶ 8, 9, A 80) thereby ratifying the Agreement between the parties. Further, Playgirl continued its acts of ratification after receiving a duplicate copy of the Agreement's term at its California office on July 17, 1973 (Miles Aff. ¶ 15, A 86-87). There is simply no room to dispute that American will succeed on its cause of action.

C. The Court Must Grant Injunctive Relief:

It is well established that "[t]he purpose of a preliminary injunction is to preserve or restore the status quo pending final determination of the action after a full hearing." *American Motorists Ins. Co. v. City Wide Transportation Co.*, 308 F. Supp. 1080, 1083 (S.D.N.Y. 1969), Lasker, J. New York courts have granted a preliminary injunction to enforce the exercise of an option, holding the option open by preventing the defendant from selling to another while a full determination of plaintiff's rights was pending. *Mathieu v. Frankel*, 33 App. Div. 2d 551, 304 N.Y.S.2d 439 (1st Dept. 1969). Indeed, a fair reading of the transcript shows that if the District Court had felt that there was irreparable injury, then the preliminary injunction probably would have issued.

This case is not unlike the case of *Regal Music Co., Inc. v. Hirsch*, 15 Misc.2d 43, 178 N.Y.S.2d 798 (N.Y. Sup. 1958), where the court granted a preliminary injunction to enforce the plaintiff's right to have exclusive placement of a coin operated phonograph in defendant's restaurant. It was noted that there was not only the risk of "a continuing and prejudicial injury to plaintiff's rights with respect to the contract in suit but also the continuing breach of the single contract as a direct impact upon the

business of the plaintiff in general." 15 Misc. 2d at 45, 178 N.Y.S.2d at 799-800. Citing *Gonzales v. Kentucky Derby Co., Inc.*, 197 App. Div. 277, 189 N.Y.S. 783 (2d Dept. 1921), aff'd *per curiam*, *sub nom. Gonzales v. Reichenthaler*, 233 N.Y. 607, 135 N.E. 938 (1922), where a preliminary injunction issued to enforce a plaintiff's right to have its coin operated amusement machine be the only such machine on defendant's premises.

On a record such as is before this court, "it is the duty of the court to grant equitable relief where a remedy does not exist at law; where great injury will result to an innocent party unless a court of equity interferes; where the rights of the plaintiff are thoroughly established, and where, as in this case, a sufficient excuse for nonperformance has not been proven. Under such circumstances, *judicial discretion to grant relief becomes judicial duty to grant it. . . .*" *Goddard v. American Queen*, 44 App. Div. 454 at 459, 61 N.Y.S. 133 at 136 (1st Dept. 1899); reversing 27 Misc. 482, 59 N.Y.S. 46 (N.Y. Sup. 1899). Although the advertising industry has not generated a great deal of litigation, certainly the case at bar will not be the first time that injunctive relief against a magazine was deemed to be a judicial obligation.

In *Goddard v. American Queen*, plaintiffs had contracted for the placement of advertising in defendant's magazine for 18 consecutive months and the defendant had agreed to "refrain from publishing any advertisement for others than the plaintiffs of" competing products. 44 App. Div. at 455, 61 N.Y.S. at 133. The *Goddard* plaintiffs brought their action seeking specific performance of that contract because the defendant had already agreed to publish competing advertisements prior to granting the contract to plaintiffs and consequently the defendant refused to publish the plaintiffs' advertisements under the conditions of the contract.

The trial court held that the contract was enforceable but that the only relief it would permit was damages and

set a date for a hearing on damages. The plaintiffs there, as American has here, declined to prove damages and appealed. The appellate division reversed, with a clear holding that specific performance is the proper remedy for failure to publish an advertisement in accordance with a contract.

The appellate division said:

" . . . The conclusion of law found by the learned judge contains the adjudication that the plaintiffs have suffered injury which probably *cannot be compensated in money damages, a conclusion which is obviously right*. Unless it be directed by a court of equity that the contract must be specifically performed, the plaintiffs are remediless. While the right to specific performance by decree of a court of equity rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances of a particular case (*McCabe v. Matthews*, 155 U.S. 550; *Heller v. Cohen*, 154 N.Y. 306, and cases cited), it is the duty of the court to grant equitable relief where a remedy does not exist at law; where great injury will result to an innocent party unless a court of equity interferes; where the rights of a plaintiff are thoroughly established, and where, as in this case, a sufficient excuse for non-performance has not been proven. Under such circumstances, judicial discretion to grant relief becomes judicial duty to grant it. . . ." 44 App. Div. at 459, 61 N.Y.S. at 136. (Emphasis added).

Noting the grounds upon which the trial court had denied specific performance the appellate division continued:

" . . . One ground upon which specific performance was refused in this case is a supposed difficulty the court would encounter in compelling the *American Queen* to perform its contract and in the enforcement of the negative provision. That such provisions in

a contract will be specifically enforced was settled by what was held in *Standard Fashion Co. v. Siegel-Cooper Co.* (30 App. Div. 564; aff'd., 157 N.Y. 60). As was said by this court in that case, the general rule is, not to decree specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction. But in the case at bar there is no such necessity, the simple obligation rested upon the *American Queen* to refrain from publishing any advertisement for any other party than the plaintiffs, of a particular kind of article so plainly described in the contract with the plaintiffs that a simple inspection of any advertisement offered by a rival of the plaintiffs would enable the defendant to determine immediately whether or not it was of goods of the same character as those advertised by the plaintiffs. . . ." 44 App. Div. at 459-460, 61 N.Y.S. at 136-37.

The court noted that a monthly magazine is not a difficult defendant to supervise:

" . . . The *American Queen* magazine was issued once a month and advertisement of a rival of the plaintiffs would be inserted but once a month; any violation of a decree of the court would be a single act, that could only occur once a month and upon process for contempt or disobedience of a decree the court could very readily determine whether a particular advertisement violated that decree or not. We think, therefore, that the complaint was improperly dismissed upon that ground." 44 App. Div. at 460, 61 N.Y.S. at 137.

Not only is a monthly magazine not difficult for a court to supervise, but the matter in controversy in the instant

case is less demanding on the court than the question in *Goddard*. The only question for the court to consider in enforcing this contract would be whether or not Playgirl has published the advertising submitted by American on its back cover; there would be no close questions of what is and is not a competing product, only a straight forward determination of whether anyone's advertisement other than American's was accepted and published.

Even if this Court, like the District Court, should be reluctant to grant a preliminary injunction seeking the affirmative relief of publication of American's advertising because of an imagined problem of supervision (A 130-131), it still should grant the negative relief sought of prohibition of other advertising. Playgirl should not be permitted to breach its agreement with American with immunity. The Court can have no problem, real or imagined, with an injunction that Playgirl not breach its contract by permitting any other advertisers to appear on its back cover. The fear of the District Court in refusing to grant such a negative injunction, "with the results that the magazine would express itself with a blank page" (A 130) is unfounded. Playgirl has accepted American's advertisements in the past and is agreeable to do so in the future and has never objected to the contents thereof (A 29, A 87). The economics of the situation will force Playgirl to run American's advertisements if they are enjoined from running others.

In short, there is no basis to deny equitable relief here. The contract is certainly a reasonable business arrangement. American pays the fair and established rate as determinable by Playgirl and published in Playgirl's rate card. Sound discretion compels an injunction here. American has made a bargain, paid a fair price and without the aid of the court, its bargain is rendered a nullity at the pleasure of Playgirl. Indeed, the denial of relief here may establish a precedent that will cause a breakdown

of contractual rights through the advertising industry. American, as any other advertiser, cannot show in a court of law, with the rigorous certainty that the rules of court require, any damage for breach of this contract and without the relief sought herein, such contracts become nullities.

Conclusion

In conclusion therefore, the plaintiff-appellant American respectfully suggests that the District Court committed reversible error when it failed to recognize the irreparable injury which occurred to the rights of American by the refusal of Playgirl to publish American's advertising on its back cover pursuant to the agreement between the parties. In so doing the District Court refused to recognize either the uniqueness of the back cover of Playgirl Magazine as advertising space or the difficulty faced by American in trying to prove damages as a result of Playgirl's breach of contract.

In effect, the District Court has recognized the injury to American's contractual rights, but has denied the remedy therefore.

Accordingly, this court is respectfully urged to reverse the District Court and to grant the preliminary injunction sought by American.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

PLAYGIRL, INC.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 27th
day of March, 1974, he served two copies of
Brief for Plaintiff-Appellant on
Kirschstein, Kirschstein, Ottinger
& Frank, Esqs., the attorneys
for Defendant-Appellee
by delivering to and leaving same with a proper person in charge of
their office at 60 East 42nd Street
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this
27th day of March, 1974.

Courtney Brown

COURTNEY BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1974